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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

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CITY OF HOUSTON, TEXAS,
Petitioner

V.

ANNE M. GORSUCH, ADMINISTRATOR,
AND
ENVIRONMENTAL PROTECTION AGENCY,
Respondents,

* * *

BRIEF OF THE STATE OF TEXAS AS AMICUS CURIAE

* * *

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Pursuant to Rule 36 of the Rules of the Supreme Court of the United States, the State of Texas represented herein by Mark White, Attorney General of Texas, files this its brief as amicus curiae.

INTEREST OF THE STATE OF TEXAS

Under the Federal Clean Air Act, 42 U.S.C. §7401, et. seq., the State of Texas is generally responsible for maintaining and implementing a State Implementation Plan (SIP) approved by the Environmental Protection Agency (EPA) which provides for the attainment of National Ambient Air Quality Standards (NAAQS) within the State. Currently, Texas is required by Section 172(c) of the Clean Air Act, to submit by July, 1982, Plan revisions that "assure" attainment of the ozone standard in Harris County, including Houston, by the end of 1987. Since the required revisions are primarily

governed by the standard to be acheived, the State of Texas is vitally interested in this litigation. In addition, certain questions regarding the EPA's authority in setting the standards, which should be clarified by this Court, will continue to affect the State of Texas in its efforts to comply with the Clean Air Act.

SUMMARY OF ARGUMENT

The State of Texas generally concurs with the arguments made by the City of Houston in its Petition for Certiorari, but will not repeat those arguments here. The State contends, first, that the Court of Appeals erred in holding that evidence of impossibility of attainment is irrelevant to the promulgation of a NAAQS. This holding misconstrues the decision in *Lead Industries Association v. EPA*, 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980), creating an area of confusion which requires review by this Court. Second, the EPA's control strategy regulations, 40 C.F.R. §50.14(c)(7), have the effect of imposing a particular method of ozone control on the states. This imposition conflicts with the provisions of the Clean Air Act, which gives the states primary responsibility for the development of the State Implementation Plan.

ARGUMENT

I. The Agency And The Court Of Appeals Erroneously Refused To Consider Whether the Ozone Standard Will Be Attainable In The Houston Area.

The decision below has disturbed the statutory role of the EPA in setting environmental standards under the Clean Air Act. The City of Houston has argued and presented evidence that naturally occurring levels of ozone in the Houston area make attainment of the 0.12 ppm standard impossible for the indefinite future. The EPA and the Court of Appeals refused to consider this

argument, holding that impossibility of attainment is irrelevant in the promulgation of the standards. For this conclusion the Court of Appeals relied[1] upon *Lead Industries Association v. EPA*, 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980), which held:

> the Administrator may not consider economic and technological feasibility in setting air quality standards . . . [because] of a deliberate decision by Congress to subordinate such concerns to the achievement of health goals.
>
> 647 F.2d at 1149.

This position was said to be "technology forcing", i.e., combining ambitious standards with strict compliance requirements, in order to compel the development of better pollution control methods. Ultimately, then, *Lead Industries* held that the burdens complained of must be borne because doing so will, one way or another, lead to attainment. Though harsh, this approach is consistent with both the Clean Air Act's unqualified mandate that the states provide for attainment by a specified date (Clean Air Act §172; 42 U.S.C. §7472), and its apparent intent that "sources of pollutants either should meet the standard of the law or be closed down." S.Rep. No. 91-1196, 91st Cong., 1st Sess. 2-3 (1970), cited in *Union Electric Co. v. EPA*, 427 U.S. 246 (1976) at 258-9.

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1. In turn, the holding in *Lead Industries* was based in part on this Court's decisions in *Union Electric Co. v. EPA*, 427 U.S. 246 (1976), and *Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975). These cases established that economic and technological factors are not to be considered in setting a technology-forcing standard. Properly speaking, the standards in those cases were not challenged as "infeasible" but merely as disutilitarian.

The position presented by the City of Houston is completely distinguishable. We are not concerned here with "economic or technological" infeasibility, but rather with a literal impossibility. The question raised by the City of Houston in the present case is whether the Act authorizes a standard that cannot be achieved regardless of the burdens assumed, including those considered in the *Lead Industries* decision. The Agency and the Court of Appeals have refused to consider this argument, holding that even if the evidence conclusively showed that attainment is impossible by any means it would be irrelevant as a matter of law.

This position is simply insupportable. First, it imputes to Congress the intent to require the states to do the impossible. Congress would no more try to regulate naturally occurring ozone levels than it would natural temperature levels. Second, the stated rationale of technology forcing is entirely absent. The Clean Air Act requires attainment of the standards and recognizes nothing short of that goal. Where attainment is not possible, the statutory sanctions cannot be avoided through greater control or improved technology. This removes an important incentive to improve air quality. Thus the decision below creates a situation that interferes with the purposes of the Act.

The potential consequences of this situation further disrupt the statutory scheme. The Act gives the states the primary discretion to develop their own State Implementation Plans. The EPA may develop its own SIP only if the state fails to submit a plan which meets the statutory requirements. Clean Air Act §110(c), 42 U.S.C. §7410(c). The decision below frees the Agency from these limitations by sanctioning impossible standards, which no SIP could ever meet. The unlimited power to set the standards is a lever by which the EPA can take over the states' role in implementation. At the same time, the states are put in a hopeless

position. The Act makes no provision for substantial compliance; the sanctions provided in the Act (such as the ban on construction of new stationary sources required by Section 110(a)(2)(I), 42 U.S.C. §7410 (a)(2)(I) are triggered by noncompliance with the NAAQS as set by the EPA. Conceding the EPA's good faith in setting the standards, the exclusion of all evidence on attainability blinds the Agency to a crucial consideration in its decision-making. There is nothing in the Clean Air Act to suggest that the EPA may ignore information on a point that would have such an impact on the states.

Thus the decision of the Court of Appeals confuses relations between the states and the EPA under the Act, and raises a conflict between impossible standards and strict compliance requirements. This conflict has been highlighted in earlier opinions by the District of Columbia Circuit. In *Natural Resources Defense Council v. EPA*, 656 F.2d 768, 785 (D.C. Cir. 1981), the Court of Appeals appeared to base its approval of water quality monitoring regulations on assurances that they would be enforced with flexibility and discretion. And in *Alabama Power Co. v. Costle*, 636 F.2d 323, 372 (D.C. Cir. 1979), the Court of Appeals purported to find an excuse from compliance where "good faith effort" had failed.[2] These opinions suggest that the D.C. Circuit has recognized and attempted to mitigate the harshness of technology forcing requirements, even where mere difficulty, and not impossibility, was involved. However, these assurances conflict with the Clean Air Act's clear

2. "Of course even a congressional mandate, such as a technology-forcing requirement based on a congressional projection of technology for the future, is subject to a justified excuse from compliance where good faith effort to comply has not been fruitful of results. That is far different from the exemption created by EPA on the basis of current technological infeasibility." 636 F.2d at 372

requirement of full compliance with the pollution standards. The decision below opens the door to a literally impossible standard, increasing the burden on the states, with no reliable prospect that enforcement of the ozone standard will be relaxed. While enforcement of the standard is not before the Court, the case at bar represents the inital departure from the statutory scheme, which will cause far greater problems in the future.

The question which remains unanswered is whether the EPA can set unattainable standards, as the Court of Appeals decision in the present case states that it can, and then insist upon strict compliance, as the Clean Air Act intends that it will. The Court of Appeals has ruled that the EPA need not even hear evidence that a given standard may be impossible to attain. This will remove the technology forcing rationale that is a key to the Act, give the EPA undue power over the State Implementation Plans, and expose the states to the statutory sanctions without hope of compliance. The decision below presents an important question of federal law, one that is central to the workings of the Clean Air Act. The outcome of this case will have national impact upon federal/state relationships, upon the public health, and upon the economy, as the costs of compliance mount. This Court should grant certiorari in order to consider and clarify these questions.

II. The Agency's Regulations Impose Specific Control Strategies on the States, Contrary to the Provisions of the Clean Air Act.

The Court of Appeals has approved EPA regulations which require, as a specific strategy for the attainment of the ozone standard, control of hydrocarbon emissions to levels set in accordance with one of four types of models. 40 C.F.R. §51.14(c)(7). This approval is at odds with the role given to the states by the Clean Air Act, and with the fundamental purpose of the Act.

Section 110 of the Clean Air Act gives the states primary responsibility in developing the State Implementation Plan. Clean Air Act, Section 110, 42 U.S.C. §7410. As long as the requirements of §110(a)(2) are met, the choice of particular control strategies lies with the states. This Court recognized the relative roles of the states and the EPA in *Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975), wherein it is stated:

> The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of §110(a)(2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards. §110(c). Thus, so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.
>
> 421 U.S. at 79.

The effect of this statutory scheme is to give the states meaningful discretion in designing their plans, and preclude the Agency from requiring particular means of control.

This discretion is in accord with the purposes of the Clean Air Act and the concepts of federalism built into it. Section 101 of the Clean Air Act reflects the Congressional intent that prevention and control of air pollution at its source be the primary responsibility of state and local governments, and that the appropriate federal role consists of leadership and financial assistance. Clean Air Act, Section 101(a)(3), (4); 42 U.S.C. §7401(a)(3), (4). Accordingly, the major purposes

of the Act include provision for national research efforts, and technical and financial assistance to the states. Clean Air Act, Section 101(b)(2), (3); 42 U.S.C. §7401(b)(2), (3). The control strategy requirements associated with the ozone standard reflect a complete departure from this framework both in terms of the state/federal relationship and in terms of EPA's obligation to provide adequate technical assistance.

The regulations at issue require that the control strategy include an assessment of the amount of hydrocarbon reduction necessary to attain the ozone standard. 40 C.F.R. §51.14(c)(7). This requirement, seemingly related only to the form of information to be submitted, will in practice limit the discretion of the states in developing a control strategy. The actual effect will be to discourage the use of control methods other than hydrocarbon control, and to limit the means by which the problem is studied.

The regulations focus on hydrocarbon reductions alone as the key bit of information by which the Plan will be evaluated. While the states are technically free to pursue other means, the emphasis on hydrocarbons in the regulations will inevitably encourage the states to adopt this "approved" strategy, and direct efforts away from possible alternatives. The evidence submitted by the City of Houston suggests that control of hydrocarbons alone will not be an effective means of controlling ozone levels, and the City has argued that control of oxides of nitrogen ("NOx") may be a crucial part of an effective stategy.[3] The regulations place a redundant burden on the State and City to control hydrocarbons *in*

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3. It remains questionable whether attainment of the 0.12 standard will be possible with any strategy. But it remains important to search for the most helpful methods, to bring about the most improvement possible in air quality. That search is for the states to direct.

addition to taking such other means as they might find helpful. Under the Act it is the State's prerogative to choose the mix of control methods. The EPA has intruded on that prerogative by requiring a showing of hydrocarbon reductions.

The second effect of the requirement is to limit the means by which the problem can be evaluated. The regulations specify four models, one of which must be used to estimate the need for hydrocarbon reductions. 40 C.F.R. §51.14(c)(7). This requirement discourages the states from making an independent study by mandating the use of limited time and resources on the required studies. To argue that the states are free to undertake such additional studies as they may desire again places a redundant burden on the states, with no prospect of corresponding benefits. If state discretion under the Act is to mean anything, the states must be free to evaluate the problems and policy choices in whatever way they find appropriate, as a first step to the autonomous development of the State Implementation Plan. If these evaluations and plans can be shown to meet the requirements of the Act, the EPA has no alternative but to approve. The regulations in question go beyond that role, thus exceeding the authority given to the Agency by Congress and violating the concepts of federalism built into the Clean Air Act.

The State of Texas further believes that the Court of Appeals' approach regarding this issue is at odds with its own reasoning in the case of *Alabama Power v. Costle, supra.* There, the court sustained guideline regulations regarding diffusion modeling requirements for permit applications under the PSD program, qualifying its decision as follows:

> But though we today sustain EPA's modeling regulations, a final observation is in

> order. Of great importance is a reasoned agency response to substantial questions of fact, policy or science raised in comments on recommended models or in proposals to employ new techniques . . . . Modeling, the agency tells us, is on 'the frontiers of scientific knowledge,' but the lack of scientific certitude about modeling techniques increases rather than reduces the need for the agency to critically examine all substantial questions of fact and science emerging from the commenting process. EPA's guideline warns that all proposed deviations from the endorsed models must be fully supported, but this language should not be overemphasized, for the models presently specified in the guidelines are concededly flawed.
>
> 636 F.2d at 387-388.

In a footnote, the court then stated:

> We would associate ourselves with the observation that "decisions which are not arbitrary and capricious in the light of existing knowledge may become so by the dint of scientific advances. By its use of estimations and sparce data, the EPA creates a continuing responsibility to develop, review and apply updated and more sophisticated information." *Texas v. EPA*, 499 F.2d 289, 301 n.16. (5th Cir. 1974).
>
> 636 F.2d 388, n.116.

That concern was prompted by technical uncertainty similar to that now at issue. Texas believes that the continued focus on hydrocarbon control alone through the use of four totally vague alternative models falls far short of EPA's "responsibility to develop . . . and apply updated and more sophisticated information," and renders the present requirement arbitrary and capricious.

CONCLUSION

For the foregoing reasons, the State of Texas believes that this case presents important issues for review and clarification by this Court, and that the petition for writ of certiorari by the City of Houston should be granted.

Respectfully submitted,

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